NO. 20818

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

REGINO MARTIN ESPINO,

Appellant,

vs.

OCEAN CARGO LINE, LTD., etc., et al.,

Appellees.

APPELLANT'S OPENING BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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APPELLANT'S OPENING BRIEF

STATEMENT OF PLEADINGS AND JURISDICTIONAL FACTS

This litigation arises out of an injury suffered on February 29, 1964 by appellant, Regino Martin Espino (hereinafter called libelant), a shipscaler, while he was assisting in the lowering of a cargo net into the hold of the vessel SS Atlantic Gladiator, owned by the appellee, Ocean Cargo Line, Ltd. (hereinafter called respondent). The action in the District Court was commenced on June 3, 1965 by the filing of a libel in personam in admiralty, wherein libelant set out separate causes of action for negligence and unseaworthiness (C. 2-7). 1/ Said libel was amended on

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1/ "C" refers to Clerk's Transcript.

August 13, 1965 (C. 8-13). On August 26, 1965, respondent filed an exception to the libel, wherein it was averred that libelant's claim was barred by laches (C. 17). An order sustaining the exception was filed by the trial court on September 13, 1965 (C. 28-1 - 28-2). Libelant's motion for leave to file a second amended libel (C. 29-39) was denied by the court on October 6, 1965 (C. 46-47). On January 5, 1966, the court entered a judgment of dismissal on the ground that the libel was barred by laches (C. 48-49). Libelant filed his notice of appeal on January 14, 1966 (C. 50).

The jurisdiction of the District Court is based on the admiralty and maritime provisions of 28 U. S. C. 1333. Furthermore, there is diversity of citizenship within the meaning of 28 U. S. C. 1332. The jurisdiction of this court to review the judgment below rests upon 28 U. S. C. 1291, notice of appeal having been filed within the time provided by Rule 73, Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

Libelant, Regino Martin Espino, filed his initial pleading in this action one year, three months and five days after the date of the action in which he was injured. In the libel in personam filed on said date (C. 2-7), and in the amended libel filed August 13, 1965 (C. 8-13), libelant alleged that:

> "Libelant's suit is not barred by laches in that libelant was born in Cuba and cannot speak, read or write the English language, is uneducated and

understood that his rights were limited to payments under the Longshoremen's and Harbor Workers' Act. At no time was he told by his employer or the Deputy Commissioner of Labor that he had any rights against the shipowners herein. Members of the crew of the vessel were present at the scene of the accident and were aware of it, and were in fact operating and controlling the winch and boom involved in the accident as above set forth, thus giving the officers and members of the crew of the vessel immediate knowledge that a serious injury to a worker had occurred. Respondents, and each of them, were thus put on notice of the accident and have not been prejudiced by any delay in the filing of this action by libelant." (C. 5, 11.)

In response, respondent, Ocean Cargo Line, filed an Exception to Libel (C. 17) in which it was alleged that:

"... the facts averred in the libel show that libelant's claim is barred by laches resulting from unreasonable delay, all to the prejudice of respondent Ocean Cargo Line, Ltd. herein." (C. 17.)

Respondent's exception was supported by an affidavit (C. 18-25) wherein respondent's attorney stated:

"The S. S. Atlantic Gladiator is a vessel which was owned by Ocean Cargo Line, Ltd., a member of

the West of England Steamship Owners Protection and Indemnity Association. On July 19, 1965, I wrote to the West of England Association with a copy to Ocean Cargo Line (S. Livanos-Hellas S. A., Piraeus, Greece) requesting information regarding the casualty, including information with respect to availability of witnesses from among the ship's crew; the vessel's present whereabouts and current schedule; etc. On August 3, 1965, owners replied that they were unable to supply this information 'in view of the fact that this vessel is no longer owned by Ocean Cargo Line, Ltd., and the crew have long since scattered to various countries.' " (C. 18-20.)

Said exception was sustained by the trial court on the ground that the claim was barred by laches, citing Brown v. Kayler, 273 F. 2d 588 (9th Cir. 1959) (C. 28-1).

Libelant thereupon moved for leave to file a second amended libel (C. 29-39), wherein libelant added the following allegation pertaining to laches:

"As a direct result of libelant's inability to speak, read or write the English language, his lack of education and his misunderstanding of his rights, as aforesaid, libelant did not consult an attorney until May 13, 1965, fourteen and one-half months after the date of the accident herein." (C. 36.)

The motion to file a second amended libel was denied by the trial court (C. 46-47). The judgment of dismissal was entered on January 5, 1966 on the ground that the libel was barred by laches (C. 48).

QUESTIONS PRESENTED

1. Whether the court erred in sustaining respondent's exception to libel in that an exception in admiralty is analogous to a demurrer and cannot be sustained on a claim of laches when facts are set out in the libel which allege both excusable delay and lack of prejudice to respondent.

2. Whether the court erred in considering respondent's affidavit in support of the exception to the libel in that an affidavit may not properly be considered on an exception to a libel in an admiralty proceeding.

3. Whether the court erred in denying libelant's motion to file a second amended libel in that the proposed second amended libel stated a claim upon which relief could be granted.

4. Whether the court erred in dismissing the libel in that said libel was not barred by laches.

I

THE TRIAL COURT ERRED IN SUSTAINING RESPONDENT"S EXCEPTION WHERE LIBELANT HAD SET FORTH FACTS IN HIS LIBEL WHICH ALLEGED BOTH EXCUSABLE DELAY AND LACK OF PREJUDICE TO RESPONDENT.

In admiralty, an exception serves the function of a demurrer in common law or equity pleadings; it should not be sustained if any cause of action is well pleaded in the libel. (Dennis v. Slyfield (6th Cir.), 117 Fed. 474, 479, 480 and The S.S. Nea Hellis (2nd Cir.), 116 F.2d 803, 805.)

A suit in admiralty is barred by laches only when there has been both unreasonable delay in the filing of the libel and consequent prejudice to the party against whom the suit is brought. (Costello v. United States, 365 U.S. 265; Akers v. State Marine Lines, Inc. (5th Cir.), 344 F.2d 217; Cities Service Oil Co. v. Puerto Rico Lighterage Co. (1st Cir.), 305 F.2d 170; Fidelity and Casualty Company of New York v. C/B Mr. Kim (5th Cir.), 345 F.2d 45, 51 et seq.; Claussen v. Mene Grande Oil Company, C.A. (3rd Cir.), 275 F.2d 108, 113.)

In the twelfth paragraph of libelant's libel (C. 5) and first amended libel (C. 11) it was alleged that the suit was not barred by laches by virtue of the fact that libelant was foreign born, could not speak, read or write the English language and was thereby ignorant of his rights, and also by virtue of the fact that the respondent had notice of the accident and was not prejudiced by the delay.

Accepting the allegations made by libelant as true, respondent's exception to libel is not well taken. Libelant has pleaded facts which excuse his delay and show that respondent was not unduly prejudiced in this matter. A court will not, on an exception to a libel, determine issues of fact. The allegations of fact contained in the libel are accepted as true on exceptions. (McDaniel v. Gulf & South American Steamship Co. (5th Cir.), 228 F. 2d 189; Walker v. Benjamin Foster Co., Inc. (U. S. D. C. Penn.), 92 F. Supp. 402; F. Jacobus Transp. Co. v. Gallagher Bros. Sand and G. Corp. (U. S. D. C. N. Y.), 161 F. Supp. 507, 512; Williams v. Moran, Proctor, Mueser & Rutledge (U. S. D. C. N. Y.), 205 F. Supp. 208, 212; Abbott v. United States (U. S. D. C. N. Y.), 207 F. Supp. 468, 471.)

In McDaniel v. Gulf & South American Steamship Co., supra, libelant had pleaded certain facts which tended to excuse his delay and averred that respondent was not prejudiced by such delay. The court held that under such circumstances laches does not appear upon the face of a libel and that the libelant should have been permitted to meet the defense of laches in a hearing on the merits. Similarly, in Walker v. Benjamin Foster Co., Inc., supra, the court pointed out that laches consists of both inexcusable delay plus prejudice to the adverse party resulting from the delay, and that where the libel sought to plead facts negativing laches or tolling the statute of limitations and it did not appear that the allegation of no prejudice to respondent was inadequate as a matter of law, exceptions would be overruled, since the appropriate time to

determine whether libelant could overcome the presumption of laches would not arise until a hearing had been held after an answer. Libelant herein has pleaded facts which, if accepted as true, excuse delay and, more important, establish that respondent was not prejudiced by such delay.

II

NOTWITHSTANDING THE PRINCIPLE THAT AN AFFIDAVIT MAY NOT BE CONSIDERED ON AN EXCEPTION TO A LIBEL, RESPONDENT FAILED TO ALLEGE SUFFICIENT FACTS TO WARRANT A DISMISSAL OF THE LIBEL.

In support of its exception to the libel, respondent herein filed an "Affidavit In Support Of Exceptions to Libel". It is a well established principle of law that affidavits may not be properly considered on an exception to a libel in an admiralty proceeding. (The Sydfold (2nd Cir.), 86 F. 2d 611; Hernandez v. The SS Flying Arrow (U. S. D. C. N. Y.), 181 F. Supp. 951; Cleary Brothers, Inc. v. Luria Steel and Trading Corp. (U. S. D. C. N. Y.), 198 F. Supp. 567; Wnuczwnski v. Argonaut Navigation Company (U. S. D. C. Md.), 130 F. Supp. 439, 441; Compagnie Generale Trans. v. City of New York (U. S. D. C. N. Y.), 114 F. Supp. 252.)

Notwithstanding this principle of law, respondent's affidavit does not allege sufficient facts to warrant a dismissal of the libel herein. In support of its position that it has been unduly prejudiced by the delay in this matter, respondent alleges that it has not been able to prepare a defense to the lawsuit because the vessel has been

sold and the crew members are no longer available (C. 18-20). Nowhere in the respondent's affidavit is there any indication as to when the vessel S. S. Atlantic Gladiator was sold, nor is there any denial that the owners of said vessel were put on notice of the accident at or about the date of its occurrence. Certainly, if the vessel S. S. Atlantic Gladiator was sold prior to the running of the applicable California statute of limitations, it could not be alleged that the late filing of libelant's libel herein was prejudicial in any way to respondents. If, in fact, the vessel was sold within one year after the accident occurred, respondent is in no different position today than it would have been had libelant filed his action subsequent to the sale of the vessel but prior to the running of the statute of limitations.

Respondent's affidavit raised certain issues of fact which could not be determined at the hearing on the exception to the libel. Libelant should have been afforded an opportunity to inquire into the factual assertions of the affidavit, utilizing pretrial discovery procedures and cross-examination techniques at the trial on the merits of the case.

III

THE COURT ERRED IN DISMISSING THE LIBEL IN THAT SAID LIBEL WAS NOT BARRED BY LACHES.

The instant libel was filed approximately three months and five days in excess of one year from the occurrence of the accident.

Applying the analogy of the California one year statute of limitations for personal injury actions, the District Court dismissed for laches.

Recent decisions in the Fourth and Fifth Circuits raise grave doubts concerning the propriety of applying the analogy of the state's statute of limitations for personal injury actions to maritime negligence or unseaworthiness actions in admiralty. In Flowers v. Savannah Machine & Foundry Co. (5th Cir. 1962), 310 F. 2d 135 and Giddens v. Isbrandtsen Co. (4th Cir. 1966), 355 F. 2d 125, the courts have held that the Jones Act three year period of limitations (46 U. S. C. 688) should be substituted for the State period as the analogous reference guide. The court in the Flowers case commented at page 138:

> " . . . one thing is very, very clear: local law is now completely irrelevant to substantive rights concerning a maritime injury at least short of death. The standing of a transitory shore-based worker as a vicarious seaman and the nature of the duty owed are established as federal maritime law. . . . So much so is this that contributory negligence and similar defenses which would bar all recovery had the identical occurrence taken place a few feet away on the dock are rejected in favor of the maritime notion of comparative fault. . . .
>
> "What is left for local law? There is nothing left save an occasional use as a reference guide in determining whether the maritime principle of laches

bars the suit. And even here it is wholly fortuitous depending on where the suit is brought--whether in the State in which the accident occurred, or elsewhere-- and on the choice-of-law rules, statutory or judge-made, of the forum state. As we have said, certitude and ease in the adjudication of claims for injury to workers in this ambiguous, amphibious area is too much to hope for. But the continued reliance as a matter of judge-made law on local statute of limitations as the reference guide does more than create administrative problems of great difficulty. In an area now clearly one for federal supremacy in substantive rights, it produces variable results depending upon the wholly fortuitous, but otherwise irrelevant, local limitation statute. This is itself to impede that essential uniformity of the admiralty which is at the heart of all of this troublesome litigation. . . .

"Since the District Court used the Georgia two-year period as the guideline, and we now hold that for this type of case, the Jones Act three-year period is to be used by analogy, the cause must be reversed and remanded for further and other consistent proceedings."

Similarly, in the Giddens case, supra, the court commented at page 127:

"The Virginia statute, we think, is not so closely related to the question as to be a significant factor. Giddens does not sue on a cause of action afforded by Virginia common law or statute. His suit is pitched exclusively on maritime law, as granting him recourse against the shipowner. While a longshoreman is not a crewman in all considerations, he is afforded comparable protection when performing the traditional duties of the crewman. (Citing cases.) We do not mean to say that 'state statutes of limitations are immaterial in determining whether laches is a bar,' . . .; we simply say that Virginia's law should not have the decisive influence accorded it by the District Court.

"On the other hand, the limitation in the Jones Act - 3 years - is a more logical and acceptable polestar. It relates to personal injuries on navigable waters. Presumably it was adopted with seamen's circumstances in mind. On the other hand, the State statute comprehends many other and more varied concerns, landside rather than offshore. Also the Jones Act is of national application, thus providing a uniform criterion wherever in the United States maritime responsibilities are to be enforced. Force

is lent to this argument by recalling that the 3 years fixed in the Federal statute represents the consensus of Congress, the final authority on remedies in admiralty, as to what is a fair opportunity for suit."

The aforementioned opinions are supported in part by a decision of the United States Supreme Court in McAllister v. Magnolia Petroleum Co., 357 U.S. 221. The McAllister case itself is limited to suits brought by seamen combining Jones Act and unseaworthiness counts and holds only that in such combined suits no shorter period of limitations can be applied than the Jones Act three-year period. Mr. Justice Brennan, concurring, suggests that the Jones Act period should be applied in all unseaworthiness cases. Mr. Justice Brennan states:

> "Just as equity follows the law in applying, as a rough measure of limitations, the period which would bar a similar action at law, . . . I think that a maritime cause of action for unseaworthiness could be measured by the analogous action at law for negligence under the Jones Act, 46 USC 688." (357 U.S. at page 229.)

Whichever statutory period is used as a reference point, libelant alleged sufficient facts in the libel to establish both excusable delay and lack of prejudice to respondent. In Brown v. Kayler (9th Cir. 1959), 273 F.2d 588, cited by the trial court in its order sustaining the exception (C. 28-1), the court considered only the

matter of whether libelant had alleged sufficient facts in his libel which would constitute a valid excuse for the delay and thereby render the application of the doctrine of laches inequitable. Libelant failed to allege any facts which would show that the respondent was not prejudiced by the delay. The fact situation in the instant case is distinguishable from the Brown case in that the libelant herein has alleged that members of the crew of the vessel were present at the scene of the accident, were aware of it, and were operating the equipment involved in the accident, thereby giving immediate notice to the respondent that an accident had occurred and negativing any presumption of prejudice.

Further, in the Brown case the delay was caused in part by errors committed by counsel in failing to file the action within the applicable statute of limitations' period. Although it was alleged that the libelant in the Brown case was an Indian unfamiliar with legal matters, there was no allegation that he could not speak or read the English language and thus be unable to communicate with others concerning his legal rights. In the instant case, libelant did not consult an attorney until after the applicable statute of limitations had run and was handicapped by a lack of ability to speak, read or write the English language.

In Gardner v. Panama Railroad, 342 U.S. 29, the Supreme Court of the United States held that "Though the existence of laches is a question primarily addressed to the discretion of the trial court, the matter should not be determined merely by a reference to and a mechanical application of the statute of limitations. The

equities of the parties must be considered as well. Where there has been no inexcusable delay in seeking a remedy and where no prejudice to the defendant has ensued from the mere passage of time, there should be no bar to relief." (342 U.S. at pages 30-31).

In Smigiel v. Compagnie De Transports Oceaniques (U.S. D.C. Penn.), 185 F. Supp. 328 a fact situation appeared which was almost identical to libelant's case herein. In the Smigiel case the libelant, a longshoreman, was born in Poland and had a limited comprehension of the English language. He was basically uneducated and was given to understand that his rights were limited to payments under the Longshoremen and Harbor Workers' Act. At no time was he told by the Deputy Commissioner of Labor that he had any rights against the shipowner. Members of the ship's crew were present at the scene of the accident, immediately after its occurrence, and thus the officers and members of the crew of the vessel had immediate knowledge that a serious injury to a longshoreman had occurred. The court ordered the exception to the libel dismissed on condition that the trial judge was convinced that the respondent, through its authorized agents, had knowledge of the accident at or about the time of its occurrence. It is of some significance that the suit in the Smigiel case was brought four years and four months after the accident, whereas libelant herein filed his suit one year and three months after the date of his accident.

See also:

Cities Service Oil Co. v. Puerto Rico Lighterage Co.

(1st Cir. 1962), 305 F.2d 170;

Even assuming the delay in filing was inexcusable, the requirement remains that prejudice therefrom must also be shown or be presumable before the bar of laches will validly arise. The United States Supreme Court has held decisively that prejudice is the sine qua non of laches, even where the delay exceeds the analogous statute of limitations period and is legally inexcusable. In Gutierrez v. Waterman Steamship Corp., 373 U.S. 206, the court stated at page 215:

> "The test of laches is prejudice to the other party. Gardner v. Panama R. Co., 342 U.S. 29-31, 96 L.ed. 31, 36, 72 S.Ct. 12; Cities Service Oil Co. v. Puerto Rico Lighterage Co., 305 F.2d 170, 171 (C.A. 1st Cir.) (both unreasonable delay and consequent prejudice) . . . ."

IV

THE COURT ERRED IN DENYING LIBELANT'S MOTION TO FILE A SECOND AMENDED LIBEL IN THAT THE PROPOSED SECOND LIBEL STATED A CLAIM UPON WHICH RELIEF COULD BE GRANTED.

In libelant's proposed second amended libel, the following statement was added relative to the reasons for the delay in filing said libel:

> "As a direct result of libelant's inability to

speak, read or write the English language, his lack of education and his misunderstanding of his rights, as aforesaid, libelant did not consult an attorney until May 13, 1965, fourteen and one-half months after the date of the accident herein." (C. 36.)

The aforesaid statement added weight to libelant's assertion that the delay in filing the libel was excusable. This fact, together with the repeated allegations concerning lack of prejudice to respondent, was sufficient to state a claim upon which relief could be granted. The court compounded its error in denying libelant's motion to file said second amended libel.

CONCLUSION

From the matters alleged in the libels filed by libelant, the authorities, and the law, it is respectfully urged that the trial court erred in:

1. Sustaining the exception where libelant set out facts in his libel which alleged both excusable delay and lack of prejudice to respondent.

2. Considering an affidavit in support of the exception.

3. Dismissing the libel on the ground that said libel was barred by laches.

4. Denying libelant's motion to file a second amended libel which alleged both excusable delay and lack of prejudice to respondent.

Respectfully submitted,

MARGOLIS and McTERNAN

By: BEN MARGOLIS

Attorneys for Appellant.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ William G. Smith

WILLIAM G. SMITH